

THE HONORABLE JUDGE DAVID G. ESTUDILLO

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GABRIELLA SULLIVAN, et al.,

Plaintiffs,

-vs-

BOB FERGUSON, in his official capacity as
Washington State Attorney General, et al.,

Defendants.

NO. 3:22-cv-05403 DGE

REPLY IN SUPPORT OF DEFENDANTS
JOHN GESE AND CHAD ENRIGHT'S
MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(B)(1) & FED. R. CIV.
P. 12(B)(6)

NOTE ON MOTION CALENDAR:
July 29, 2022

Plaintiffs' opposition briefing (Dkt. 53) confirms that Defendants Gese and Enright are the improper targets of this lawsuit and that all claims against them should be dismissed. Plaintiffs have not only failed to overcome the deficiencies of their Complaint, but they make several concessions or clarifications that highlight the impropriety of Gese and Enright as defendants in this matter. Accordingly, all claims against Gese and Enright should be dismissed because: (1) no plaintiff has standing to bring a suit for declaratory judgment or injunctive relief against Gese or Enright, and (2) Plaintiffs have failed to articulate a valid claim under 42 U.S.C. §1983 with respect to these defendants.

1 **A. Plaintiffs Lack Standing to Bring Pre-enforcement Challenge**

2 **1. Sullivan, Martin, Second Amendment Foundation, and Firearms Policy**
 3 **Coalition Lack Standing Because They Fail to Allege an Injury in Fact**

4 Plaintiffs and Defendants agree that standing does not require “the plaintiff first expose
 5 himself to actual arrest or prosecution to be entitled to challenge the statute he claims deters the
 6 exercise of his constitutional rights.” *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289,
 7 298, 99 S. Ct. 2301, 2309, 60 L. Ed. 2d 895 (1979). However, Plaintiffs fail to consider that a
 8 plaintiff who has not been prosecuted under a challenged statute must still establish more than a
 9 “vague desire” or “some-day intentions” to violate the law before that plaintiff may invoke
 10 standing. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980 (9th Cir. 2013) (holding
 11 that the plaintiff had standing to bring a pre-enforcement challenge where he made “specific
 12 allegations” substantiating his concrete plan to violate the law by identifying suppliers, design
 13 plans, and hundreds of customers who have ordered the prohibited item at his asking price.).

14 Plaintiffs Sullivan, Martin, Second Amendment Foundation, and Firearms Policy Coalition
 15 failed to articulate any actual injury and they failed to articulate any concrete plan to violate the
 16 law and suffer future injury. The Complaint fails to articulate anything more than a “vague desire”
 17 or “some-day intentions” of these plaintiffs to violate the law. In their opposition briefing,
 18 Plaintiffs describe the requirement to articulate a “concrete plan” to violate the law as a
 19 requirement “of the Kitsap Defendants.” Plaintiff’s Response, page 5, lines 25-26. But this is not
 20 an arbitrary requirement of the Defendants, this is the controlling precedent of existing case law.
 21 See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (differentiating between “some-
 22 day” intentions and “concrete plans”); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d
 23 1121, 1126 (9th Cir. 1996)(requiring a “genuine threat of imminent prosecution,” and not the
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“mere possibility of criminal sanctions.”). Despite the arguments asserted in their opposition, the fact remains that the Complaint fails to articulate any concrete plan of Plaintiffs Sullivan, Martin, Second Amendment Foundation, and Firearms Policy Coalition to violate the law.

Plaintiffs’ heavy reliance on *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014) to support their claim of standing is misplaced. *Jackson* does not address the issue raised by Defendant Gese and Enright’s motion, i.e., whether Plaintiffs have plead a sufficiently concrete plan to violate the law in order to bring a pre-enforcement challenge. Instead, the court in *Jackson* was asked to determine whether being required to travel out of town to purchase a prohibited type of ammunition is sufficient for a plaintiff to establish an injury. The court determined that being forced to travel to purchase ammunition was a sufficient injury. The court did not conduct any analysis of whether the plan to do so was sufficiently articulated by plaintiffs (which is the issue in the present case). The holding in *Jackson* is therefore irrelevant and unhelpful. Plaintiffs in the present case have not articulated any plan to purchase the prohibited magazines, regardless of whether that plan involves traveling out of state or purchasing locally.

Because Plaintiffs Sullivan, Martin, Second Amendment Foundation, and Firearms Policy Coalition have failed to articulate a concrete plan to violate the law, their suit is premature and they lack standing to proceed with this lawsuit. Accordingly, the claims against Gese and Enright must be dismissed.

2. Rainier Arms Lacks Standing to Bring a Suit Against Gese and Enright Because It Fails to Allege Causation Between Economic Injury and Defendants’ Conduct

The only Plaintiff to have potentially articulated an injury in fact is Rainier Arms. As Plaintiffs explain, Rainier Arms alleges that it will suffer an economic injury for its inability to sell large capacity magazines under the new law. Dkt. 53, page 7, lines 7-10. However, Rainier

Arms nonetheless lacks standing under Article III with respect to a claim against Defendants Gese and Enright because it failed to allege sufficient facts to show the economic injury suffered by Rainier Arms is traceable to the conduct of these defendants, as required. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992) (standing requires showing the claimed injury is “fairly traceable to the defendant's allegedly unlawful conduct.”). As stated in Defendants’ motion, Supreme Court precedent requires standing to be established through three elements: (1) injury in fact, (2) causation, and (3) redressability. *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-4 (2008). Accordingly, even though Rainier Arms may have articulated an economic injury, they failed to plead a causal connection between that injury and the conduct of Defendants Gese and Enright.

Plaintiffs incorrectly rely upon *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 842, *opinion amended on denial of reh’g*, 312 F.3d 416 (9th Cir. 2002) for the assertion that Rainier Arms need only trace its injury to the enactment and threatened enforcement of the law in question. Dkt. 53, page 7, lines 23-26. Nowhere in *National Audubon* does the Ninth Circuit support a departure from the Supreme Court’s requirement that a plaintiff must show a causal connection between their injury and the conduct of the defendants. *Id.* Additionally, the facts in *National Audubon* are readily distinguishable from the facts in this case. In *National Audubon*, the plaintiffs sought to challenge a California proposition which prohibited the use of specific animal traps. The plaintiffs sued the state officials with “direct authority over and principal responsibility for enforcing” the proposition and also against federal parties who removed the prohibited traps from forest land. *Id.* at 842 847, and 849. The plaintiffs did not sue local county sheriffs or local county prosecutors, and their claims against other state agencies and the state governor were ultimately dismissed. *Id.* at 847. Accordingly, in *National Audubon*, the plaintiffs had standing because they

1 were able to trace their claimed economic damages to the conduct of the defendants. In sharp
 2 contrast to *National Audubon*, Plaintiffs' Complaint articulates no conduct of Gese or Enright
 3 which is in any way traceable to the claimed economic injuries of Rainier Arms.
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5 Plaintiffs assert that Rainier Arms has standing to bring suit against Gese and Enright
 6 because these individuals generally have authority to enforce the law in question. However, the
 7 Complaint provides no factual allegations to suggest that Gese or Enright ever have or that they
 8 ever will enforce the law. Furthermore, the Complaint provides no factual allegations to suggest
 9 that Gese or Enright have authority to enforce the law against Rainier Arms. In fact, Plaintiffs
 10 concede that Gese and Enright cannot do so:
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12 It might be further argued that Rainier Arms, located in King County, does
 13 not have standing to sue the Kitsap Defendants because they do not play a
 14 role in enforcing the law where Rainier Arms is located. To be clear, this
 15 would not affect Rainier Arms' standing to bring this suit generally, just
 16 their standing to sue the Kitsap Defendants specifically.

17 Dkt. 53, page 8, lines 3-7 (emphasis added).

18 This concession by Plaintiffs is supported by Washington law which provides that a sheriff
 19 in Washington has jurisdiction to enforce laws "within the boundaries of his or her county." *State*
 20 *v. Knight*, 79 Wn. App. 670, 681, 904 P.2d 1159 (1995); RCW 36.28.010. With regard to a county
 21 prosecutor, the Complaint provides no allegations to suggest that a Kitsap County prosecutor could
 22 prosecute Rainier Arms for the sale of prohibited magazines in King County.

23 After acknowledging this deficiency, Plaintiffs simply assert that Rainier Arms could
 24 potentially be subject to prosecution "if it sought to sell or otherwise distribute banned magazines
 25 directly into Kitsap County as part of its online business." Dkt. 53, page 8, lines 7-9. This statement
 26 demonstrates the speculative and hypothetical nature of Rainier Arms' potential injury at the hands
 27 of Gese or Enright. This speculative prosecution is a far cry from the injury-in-fact required by
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Article III.

Because Rainier Arms has suffered no injury that is fairly traceable to the conduct of defendants Gese and Enright, Rainier Arms has no standing to bring suit against Gese and Enright and all claims against them should be dismissed.

B. Plaintiffs Attempted Monell Claims Fail as A Matter of Law

While the Complaint references 42 U.S. § 1983 and § 1988, it is absolutely silent with regard to any factual allegations which would form the basis of any such claims. Plaintiffs, in their responsive briefing, attempt to clarify that their § 1983 claims are brought against Defendants Gese and Enright solely in their “official capacities.” This clarification does not save their claims from dismissal for several reasons discussed below.

1. Plaintiffs Do Not Contest They Failed to Articulate Personal Participation of Defendants Gese and Enright

Defendants Gese and Enright moved for dismissal of all § 1983 and § 1988 claims on the basis that Plaintiffs fails to articulate a valid claim against these individual defendants. Plaintiffs do no challenge or oppose this contention. Instead, they assert they are not bringing § 1983 claims against Enright and Gese in their personal capacities and thus are not seeking to hold these individuals liable for damages arising from any potential constitutional violations.

2. Plaintiffs Fail to Articulate a § 1983 *Monell* Claim

While Plaintiffs assert they are bringing claims against Gese and Enright in their official capacities only, the precise nature of Plaintiffs’ claims are not articulated in the Complaint and are only muddled further by Plaintiffs’ opposition briefing.

Plaintiffs state that their official-capacity claim “represent[s] only another way of pleading an action against an entity of which an officer is an agent.” Plaintiffs cite *Kentucky v. Graham*,

1 473 U.S. 159, 165 (1985) for this quote. However, this quote actually originates from footnote 55
 2 in *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018 (1978)
 3 wherein the Supreme Court confirmed that local governments are included among those “persons”
 4 against whom a § 1983 claim can be brought. Since the ruling in *Monell*, § 1983 claims brought
 5 against local governments, as opposed to claims against individuals, are often referred to as
 6 “*Monell*” claims. Plaintiffs concede that their “official capacity” § 1983 claims against Defendants
 7 Gese and Enright are the same as claims against these “officers’ office.” Dkt. 53, page 10, lines
 8 12-14. Essentially, Plaintiffs are conceding that the § 1983 claims against Gese and Enright are
 9 actually *Monell* claims against the State. *Id.*, lines 14-15. However, Plaintiffs still fail to clarify the
 10 basis for any § 1983 damages even in this context. In fact, Plaintiff’s opposition briefing suggests
 11 they are merely seeking injunctive relief and not § 1983 damages at all. *Id.*, lines 14-15. Plaintiffs
 12 further state that they are seeking injunctive relief against the State and that they have named
 13 officials at “the state and local level (including the Kitsap Defendants) who are charged with
 14 enforcing that law (and against whom injunctive relief may run).” *Id.*, lines 14-15 and 20-23.

15 While Plaintiffs imply their § 1983 claims against Gese and Enright are claims against the
 16 State, the Complaint itself fails to identify the entity that is the subject of these official capacity
 17 claims. In other words, the Complaint does not specify whether Plaintiffs are attempting to bring
 18 a *Monell* claim against Kitsap County or the State of Washington. Either way, Plaintiffs’ *Monell*
 19 claim fails as explained below.

20 A Plaintiff may assert a *Monell* claim for local government liability by demonstrating that
 21 an official policy, custom, or pattern on the part of the government entity was the actionable cause
 22 of a constitutional injury. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012). A local
 23 government may only be held liable under § 1983 for acts which the government “has officially
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1 sanctioned or ordered.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915 (1988)
 2 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470, 106 S. Ct. 1292 (1986)). Furthermore,
 3 only those government officials who have “final policymaking authority” may subject the
 4 government to § 1983 liability by their conduct. *Id.* at 123 (quoting *Pembaur* at 483).

6 If Plaintiffs’ *Monell* claims are targeted at Kitsap County, Plaintiffs’ claims fail because
 7 they have failed to identify a policy or officially sanctioned act of Kitsap County which has
 8 deprived Plaintiffs of any constitutional rights. The Complaint only identifies the existence of a
 9 state law. It fails to identify any law, regulation, or policy of Kitsap County that is alleged to have
 10 caused any constitutional deprivation. Accordingly, Plaintiffs have not stated a *Monell* claim
 11 against Kitsap County and any such purported claim should be dismissed.

13 If Plaintiffs’ *Monell* claims are targeted at the State of Washington, then these claims
 14 similarly fail. In order to pursue a *Monell* claim against the State through Defendants Enright and
 15 Gese, Plaintiffs must articulate that Gese and Enright have final policymaking authority sufficient
 16 to subject the State to liability for their conduct. The Complaint, which challenges state law, fails
 17 to explain how Gese or Enright have final policymaking authority to create or enact this law.
 18 Furthermore, the Complaint fails to identify any other conduct of Gese or Enright which may be
 19 attributed to the State. Under federal case law, officers may be sued in their official capacity in an
 20 effort to bring a claim against a local government when the conduct of the officers is attributed to
 21 the local government. See *Brandon v. Holt*, 469 U.S. 464, 472, 105 S. Ct. 873, 878, 83 L. Ed. 2d
 22 878 (1985) (“For the purpose of evaluating the city's potential liability under § 1983, our opinion
 23 clearly equated the actions of the Director of the Department in his official capacity with the
 24 actions of the city itself.”). Here, no action or conduct of Gese or Enright is alleged at all, much
 25 less any conduct which may be attributed to the State for purposes of *Monell* liability. In fact, the
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opposite is true. Plaintiffs are attempting to name local officials in this lawsuit to establish liability for a policy enacted by the state. Federal law does not support such lawsuits.

3. Gese and Enright Are Redundant Defendants and Should Be Dismissed

Plaintiffs' § 1983 official capacity claims against Gese and Enright should be dismissed because they are cumulative and redundant of Plaintiffs' claims against the State. Under federal case law, "when both an officer and the local government entity are named in a lawsuit and the officer is named in official capacity only, the officer is a redundant defendant and may be dismissed." *Luke v. Abbott*, 954 F. Supp. 202, 203 (C.D. Cal. 1997). See also *Vance v. County of Santa Clara*, 928 F.Supp. 993, 996 (N.D.Cal.1996) and *Carnell v. Grimm*, 872 F. Supp. 746, 752 (D. Haw. 1994), *aff'd in part, appeal dismissed in part*, 74 F.3d 977 (9th Cir. 1996).

The Supreme Court has noted that since the holding in *Monell*, "There is no longer a need to bring official-capacity actions against local government officials, for under *Monell*, [...] local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14 (1985). In *Luke*, the district court noted that dismissal of a government officer acting in an official capacity was appropriate to avoid "duplication of documents and pleadings, as well as wasted public resources for increased attorneys fees." *Luke* at 203. The district court further noted, "[a] plaintiff cannot elect which of the defendant formats to use. If both are named, it is proper upon request for the Court to dismiss the official-capacity officer, leaving the local government entity as the correct defendant." *Id.* Since the § 1983 official capacity claims against Gese and Enright are duplicative and redundant of the § 1983 claims against the State, the court should dismiss the same.

1 **4. “Official Capacity” Claims Against Gese and Enright Should Be Dismissed**
 2 **Based Upon Sovereign Immunity**

3 Finally, the § 1983 claims against Defendants Gese and Enright should be dismissed based
 4 upon the principle of sovereign immunity. Plaintiffs assert that their § 1983 claims against Gese
 5 and Enright are based upon their official capacity as agents for the state. The Eleventh Amendment
 6 bars 42 U.S.C. § 1983 suits brought against the state or agents of the state. *Will v. Michigan Dep't*
 7 *of State Police*, 491 U.S. 58, 65, 71 (1989). Courts have dismissed § 1983 claims against the State
 8 of Washington and its agents on this basis. See *Jenkins v. Washington*, 46 F. Supp. 3d 1110, 1119
 9 (W.D. Wash. 2014); *Lojas v. Washington*, 347 Fed. Appx. 288, 290 (9th Cir. 2009) (“the district
 10 court also correctly dismissed appellants' § 1983 claims against Officer Ray–Smith in her official
 11 capacity on Eleventh Amendment grounds”); *Adamson v. Pierce Cnty.*, 3:21-CV-05592-DGE,
 12 2022 WL 1667016, at *1 (W.D. Wash. May 25, 2022) (dismissing official capacity § 1983 claims
 13 against Pierce County prosecutors based on the doctrine of sovereign immunity.) To the extent
 14 Plaintiffs sue Gese and Enright in their official capacities based upon an allegation that they are
 15 agents of the State, these claims must be dismissed pursuant to sovereign immunity.
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19 **CONCLUSION**

20 For the reasons set forth above, Plaintiffs’ claims against Defendants Gese and Enright
 21 should be dismissed with prejudice.

22 Respectfully submitted this 28th day of July, 2022.

23
 24 CHAD M. ENRIGHT
 25 Kitsap County Prosecuting Attorney

26 /s/ Christine M. Palmer

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CERTIFICATE OF SERVICE

I certify that on July 28, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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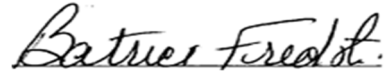
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2 SIGNED in Port Orchard, Washington this 28th day of July, 2022.

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